Supreme Court, U.S.
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NO. 85-1990

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STANLEY STERNER,

Appellant

v.

DAVID J. ANDRE, ET AL.,

Appellees.

On Appeal From the Supreme Court
Of the Commonwealth of Virginia

MOTION TO DISMISS OR AFFIRM

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MOTION OF APPELLEE TO DISMISS OR, IN THE ALTERNATIVE, AFFIRM

Pursuant to Rule 16.1, Appellees David J. Andre, et al., respectfully move this Honorable Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Virginia on the grounds that said Court has the authority to prescribe rules for the proper administration of justice and that it is manifest that this case does not present a substantial federal question.

STATEMENT OF FACTS

On July 19, 1984, Stanley Sterner, pro se appellant herein, filed a Motion for Judgment in the Circuit Court of the City of Winchester against several attorneys who had represented him in an

earlier action. Mr. Sterner alleged that the attorneys had fraudulently and negligently performed their duties. On June 3, 1985, several days after a full trial before a jury, a judgment order was entered dismissing Mr. Sterner's case with prejudice on the ground that he had not satisfied his burden of proof to show legal malpractice. Mr. Sterner filed a Motion to Reconsider which the Circuit Court considered and then denied.

Mr. Sterner then submitted a Notice of Appeal to the Supreme Court of Virginia on July 1, 1985. On February 13, 1986 the Supreme Court of Virginia dismissed Mr. Sterner's appeal, finding that the appeal was not perfected in the

manner provided by law. The Order cited Virginia Supreme Court Rule 5:9(b) (now Rule 5:11) which provides:

> Rule 5:9. Transcript or Written Statement.
> (Effective October 1, 1984)
>
> . . .
>
> (b) The transcript of any hearing also becomes a part of the record when, within sixty days after entry of the final judgment, the transcript is filed in the office of the clerk and a notice signed by counsel for the appellant is filed in the officer of the clerk identifying the transcript and reciting its delivery to the clerk. There shall be appended to the notice either a certificate of counsel for the appellant that a copy of the notice has been mailed to opposing counsel or an acceptance of service such notice by opposing counsel.
>
> . . .

Va. Code, Sup. Ct. R. 5:9(b) (1984).

Mr. Sterner then filed a Petition for

Rehearing on February 25, 1986, in which he alleged that the Supreme Court of Virginia acted arbitrarily in dismissing his appeal and violated his right to "equal justice." This petition was denied on March 7, 1986.

Finally, Mr. Sterner's dissatisfaction with the disposition of his case within the Virginia judiciary, has led him to petition this Court for relief. In essence, Mr. Sterner is requesting that this Court instruct the Virginia Supreme Court on how to interpret and apply its own rules.

ARGUMENT

1. The Supreme Court of Virginia Has Authority To Prescribe Such Rules Of Procedure Or Practice As May Be Necessary For The Proper Administration Of Justice.

The Supreme Court of Virginia has authority, under the United States Constitution, to promulgate and enforce rules of procedure and practice for administration of justice in the Commonwealth of Virginia. This power is derived from the Tenth Amendment which provides, in pertinent part, that,

> [t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively, or to the people.

U.S. Const. Amend. X. By providing for a division of powers between the States and the federal government, the framers of the Constitution reserved to the States, inter alia, the power to maintain state judicial systems for the determination of legal controversies. Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281,285 (1970).

Acting within its power to maintain its own judicial system, the Commonwealth of Virginia has vested in its highest court, the Supreme Court, the power to prepare a system of rules for practice in all courts of the Commonwealth.[1/] Rule 5:9, the Virginia

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1/ § 8.01-3. Supreme Court may prescribe rules; effective date
(footnote continued)

Supreme Court Rule being challenged by Mr. Sterner, is such a rule. Rule 5:9 prescribes the procedures by which a transcript becomes part of the record on appeal. This rule is jurisdictional and

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(footnote continued from previous page)

thereof; rules to be printed and distributed; rules to be published, indexed, and annotated; effect of subsequent enactments of General Assembly. -- A. Supreme Court to prescribe rules. -- The Supreme Court, subject to... may, from time to time, prescribe the forms of writs and make general regulations for the practice in all courts of the Commonwealth; and may prepare a system of rules of practice and a system of pleading and the forms of process and may prepare rules of evidence to be used in all such courts. This

(footnote continued)

any failure to comply with it results in the dismissal of an appeal. Towler v. Commonwealth of Virginia, 216 Va. 533, 221 S.E.2d 119 (1976) (appellee's motion to dismiss writ of error granted because of appellant's failure to properly make transcript a part of the record).

It follows from the separation of powers doctrine and the inherent power of courts to prescribe rules of practice and procedure, that "the orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are

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(footnote continued from previous page)
section shall be liberally construed so as to eliminate unnecessary delays and expenses.

Va. Code § 8.01-3 (1984).

shown to exist." United States, Ex Rel. v. Tyler, 269 U.S. 13, 17 (1925). In at least one "exceptional circumstance" this Court has found it necessary to "interfere" with an earlier version of Rule 5:9 of the Supreme Court of Virginia. In Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), this Court granted a petition for certiorari to hear for a second time a case involving the alleged discrimination against a black family in the use of certain community facilities. The Supreme Court of Virginia had twice refused to hear this case on the ground that the appeals had not been perfected as required by Rule 5:1 (an earlier version of Rule 5:9), a procedural rule of the court. In Sullivan, this Court clearly

stated that the Virginia Court rule was not "a novel procedural requirement... ." 396 U.S. at 233. Moreover, it did hold that the Virginia court had not "so consistently applied its notice requirement as to amount to a self-denial of the power to entertain the federal claim here presented... ." Id. at 234.

Rule 5:9 as applied in this case does not bar any federal claim from being considered by either the Supreme Court of Virginia or this Court. Mr. Sterner originally brought an action for legal malpractice, based on Virginia law, in the Circuit Court of the City of Winchester, a trial court of general jurisdiction within the Commonwealth. Being dissatisfied with the decision of

the trial court, Mr. Sterner filed a petition in the Virginia Supreme Court. Mr. Sterner failed to comply with the requirements of Rule 5:9(b) and therefore, the court, pursuant to its authority, dismissed Mr. Sterner's petition for appeal. In this case there are no exceptional circumstances which require this Court to override the authority of the Virginia Supreme Court.

Rule 5:9, as are all the Virginia rules of procedure, is published in written form and available to the general public, including pro se petitioners such as Mr. Sterner. The Supreme Court of Virginia has clearly indicated the importance of Rule 5:9 in cases in which the transcript is

indispensable to disposition of the appeal. In Towler, supra, the Virginia Supreme Court stated,

> We take the occasion, however, to reiterate the jurisdictional nature of Rule 5:9 and to reemphasize the necessity of compliance with its mandatory requirements. We do this because we have observed far too many violations of this rule; and we lament the numerous instances in which we have been forced to dismiss appeals because of failure to observe the rule's requirements.

216 Va. ___, 221 S.E.2d at 121. In the instant case, Mr. Sterner failed to comply with the requirements of Rule 5:9, and the court, acting within its inherent power to prescribe and

apply rules necessary for the proper administration of justice, dismissed Mr. Sterner's petition for appeal.

In summary, the Virginia Supreme Court has authority to prescribe rules for the administration of justice. Clearly, the Court lawfully exercised this authority when it promulgated Rule 5:9 and when it dismissed Mr. Sterner's petition for failure to comply this Rule.

2. There Is No Substantial Federal Question To Be Decided In This Case.

Notwithstanding the proposition asserted above that state courts have authority to administer justice, this Court has on occasion reviewed challenges to state court rules, as demonstrated in Sullivan v. Little

Hunting Park, supra, when such challenges involved issues of substantial federal question. It is clear that there is no substantial federal question here.

This Court has jurisdiction to review state court decisions that involve state court rules which are unconstitutional. In In re Griffiths, 413 U.S. 717 (1973), a Dutch citizen residing in Connecticut was denied permission to take the Connecticut bar examination because of a citizenship requirement imposed by a state court rule. The state courts upheld the rule against the applicant's constitutional challenge. This Court noted probable jurisdiction and held that the rule unconstitutionally discriminated against

resident aliens. In its opinion, the Court stated that "a State has a constitutionally permissible and substantial interest" in the qualifications of those admitted to practice law. 413 U.S. at 722. However, the Court found that, pursuant to the Connecticut court rule, the sole basis for the applicant's disqualification was her status as a resident alien and therefore, the rule violated the Equal Protection Clause of the Fourteenth Amendment.

Although a state court rule on its face is not unconstitutional, this Court will nonetheless review a state court order which attempts to bar a serious federal constitutional claim based on a court rule. In NAACP v. Alabama, 377

U.S. 288 (1964), the National Association for the Advancement of Colored People was restrained by an Alabama trial court from conducting any business in Alabama. The Association appealed to the Supreme Court of Alabama. The Alabama court affirmed the lower court's decision, relying on a procedural rule mandating the dismissal of all writs of error if one writ of error failed. This Court held that the Alabama court's application of its procedural rule was not "adequate to bar its review of the Association's serious constitutional claim." 377 U.S. at 296.

Contrary to Mr. Sterner's arguments, this case does not present any substantial federal questions comparable to those raised in NAACP v.

Alabama or In re Griffiths, or in other related decisions of this Court. See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978); and Hathorn v. Lovorn, 457 U.S. 255 (1982). There is no support in any of the authority appellant cites for the proposition that Rule 5:9 on its face is unconstitutional or that the application of Rule 5:9 to Mr. Sterner's petition was an attempt by the Virginia Supreme Court to bar decision of a substantial federal question.

The alleged federal question which Mr. Sterner suggests is presented in this case is whether the application of Rule 5:9 by the Virginia Supreme Court violates his constitutional rights as a pro se litigant. There is no authority

for the proposition that pro se litigants constitute a suspect classification entitled to special treatment under the Equal Protection Clause of the Fourteenth Amendment. Mr. Sterner does cite several cases which explicitly support the proposition that pro se complaints, however unskillfully pleaded, are to be liberally construed. See Vinnedge v. Gibbs,k 550 F.2d 926, 928 (4th Cir. 1977); Hudspeth v. Figgins, 584 F.2d 1345, 1347 (4th Cir. 1978); and Frazier v. Collins, 538 F.Supp. 603, 605 (E.D.Va. 1982).2/ However, these cases

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2/ The pro se litigants in Vinnedge, Hudspeth, and Frazier, supra, were all prisoners of the state at the time they filed their complaints. Here, Mr. Sterner is asserting a common law tort claim against his former counsel who represented him in a case matter.

do not indicate that pro se litigants are afforded liberal compliance with court procedural rules. The Virginia Supreme Court has the authority to promulgate procedural rules for the proper administration of justice and to apply this rule strictly to all petitioners to the state court.

CONCLUSION

Wherefore, appellee respectfully submits that the Supreme Court of Virginia was acting properly within the scope of its authority when it promulgated and applied Rule 5:9, and that there is no substantial federal question to be decided in this case. Appellee respectfully moves the Court to

dismiss this appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Virginia.

Respectfully submitted,
JORDAN COYNE SAVITS & LOPATA

By _____
David P. Durbin
JORDAN COYNE SAVITS & LOPATA

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, first class and postage prepaid, this 7th day of July, 1986, to:

Stanley Sterner
2544 Wilson Boulevard
Apartment Number 104
Winchester, Virginia 22601

_____
David P. Durbin